Filed 11/21/16 Marriage of Wagnon and From CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

In re the Marriage of ALICIA FRANCES WAGNON and RICHARD SCOTT FROM.	C079355
ALICIA FRANCES WAGNON, Respondent, v. RICHARD SCOTT FROM, Appellant; PLACER COUNTY DEPARTMENT OF CHILD SUPPORT SERVICES, Intervener and Respondent.	(Super. Ct. No. SDR19000)

In this appeal from an order denying his motion to "correct" a child support order entered nearly seven years earlier, appellant Richard From now contends that the order is void as against public policy "because both the *criteria* to be used in setting child support

. . . and . . . the methodology to be employed in determining the amount of child support . . . were completely ignored by the trial court."[1] Finding no merit in From's arguments, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The origins of this marital dissolution case are not shown by the record on appeal, but From asserts that the parties were married in 1993 and that this proceeding was commenced in 2001. In the interim, in 1997, the parties had triplets.

The record *does* show that the case came on for trial in December 2007, on a postjudgment order to show cause filed by Wagnon in July 2007. Instead of trying the case that day, however, the parties entered into a settlement on the record. As relevant here, one of the issues the parties settled was child support. The terms of the parties' settlement were reduced to a formal findings and order after hearing that was filed in February 2008. The order provided that From was to pay Wagnon $16,500 per month in child support ($198,000 per year) starting December 1, 2007, with $5,000 payable in cash and the other $11,500 ($138,000 annually) payable in stock or cash. The $5,000 cash payment (the "Cash Component") was payable half on the first of the month and half on the 15th. The $11,500 in stock or cash (the "Stock Component") was payable as follows:

From worked as an investment banker for a corporation that was owned by both parties (and was named after their three children). The work of the corporation involved setting up new, publicly traded companies. As compensation, the corporation would receive shares of stock in the new companies, and the corporation would distribute some of those shares to From. It was from *those* shares that the "Stock Component" of child support was to be paid. Specifically, From was to pay Wagnon "10 percent of all stock received by him when it is received, guaranteed to be a total net value paid to [Wagnon]

---

[1] As the parties now have different surnames, we will refer to them by those names.

of $138,000 a year in addition to the Cash Component." By "net value," the parties meant the "actual cash made available to [Wagnon] after sale and any costs of sale arising from this Stock Component." To the extent the "Stock Component" amounted to "less than a total of $138,000 per year," From was to "make up the difference in cash to [Wagnon]" at periodic intervals "so that the total sum paid to [Wagnon] on this Stock Component equal[ed] $138,000.00 per year." (The periodic intervals -- at which time an "accounting and adjustment" was to be performed -- were identified as June 30, 2008; every 90 days thereafter until the year's end; then every four months thereafter.)

The order specified that the child support payable by From was to cover all "childcare and medical expenses" and "special needs expenses of the children." The order further specified that the amount of child support that would have been ordered under the statewide child support guideline was disputed, and the parties expressly "waived the right to have the Court actually determine what [guideline] support is."

In April 2008, two months after the formal court order was entered and four months after the stipulation was taken on the record, From filed a motion to modify child support. The hearing on From's motion was continued several times, then set for a long cause trial, but at a settlement conference in May 2008, the parties stipulated to drop the motion.

In April 2009, the Placer County Department of Child Support Services (the department) filed a motion to modify child support at From's request. The motion asserted a "change of circumstances" based on the attached income and expense declarations from each party. Both parties filed their own responses to the motion, with From filing his on the day of the hearing (May 20).[2] Among other things, From complained that "[t]he Court issued an order that was impossible to fulfill during

---

[2] Only From's filing has been made part of the record on appeal.

December 2007 and current market conditions make this task highly improbable during the for seeable [*sic*] future." The court heard testimony and argument on the matter, then took it under submission following the filing of any reply in June 2009.

In ruling on the motion to modify in August 2009, the court noted that From had "attached to his response various documents which appear to relate to the status of various pending business transactions," but the documents were "of little assistance to the court in determining what [his] actual income is." The court noted that Wagnon was objecting to any modification, "urging the court to rely on [From's] income history, leading up to the current order, of more than half a million dollars per year for the preceding 5 years." Wagnon further argued "that the nature of [From's] business and the fluctuating stock market were taken into consideration in entering into the stipulation for the current order." While recognizing that "the national economy ha[d] taken a turn for the worse since the current order was entered into, and such turn would likely have an effect on [From's] income," the court nonetheless denied the motion to modify because From had "failed to produce coherent, credible evidence of what his income actually is."

In March 2010, From filed an order to show cause to modify child support. That order to show cause was resolved by stipulation in February 2011, with the parties agreeing that starting April 1, 2010, From would pay $1,250 per month in child support. A formal order after hearing incorporating the parties' stipulation was filed in April 2011.

Still facing a substantial amount of arrears from the period during which the February 2008 order was in effect, in October 2014 From filed a motion to "correct" the February 2008 order "TO REF[L]ECT THE TRUE TERMS OF THE ORDER AGREED TO" in December 2007. In support of that motion, From asserted that he "did not agree to pay $16,500 a month in child support"; instead, he "agreed to pay a base of $5000 per month and share profits on a periodic basis which was then forecast to be $138,000, but [might] vary based upon the value of the stock when we did an accounting and adjustment."

In March 2015, the trial court denied the motion to correct the February 2008 order. The court concluded that "the language of the order tracks the terms of the stipulation as recited in court," and "[t]here was no error, judicial or clerical, advertent, or inadvertent, in the entry of the subject order."

From timely appealed.

DISCUSSION

On appeal from the trial court's order denying his motion to "correct" the 2008 support order, From does not challenge the trial court's ruling that the language of the order tracked the terms of the stipulation as recited on the record in court. Instead, he offers an entirely new argument that he never presented to the trial court. In his opening brief, he asserts that, in entering the February 2008 support order, "[t]he trial court ignored public policy and approved a non-guideline child support agreement that violated the law requiring that child support payments be based upon the parent's income and ability to pay. The court did not perform the analysis required by [Family Code sections] 4046, 4055, and 4065, and correspondently, the actual ability of [From] to pay according to the proposed agreement was never validated. This was reversible error."[3] From also asserts in his opening brief that "the stipulated agreement [from December 2007] is void against public policy."

Faced with the department's argument in its respondent's brief that From's claim of reversible error in the 2008 support order comes years too late,[4] in his reply brief From retreats from any claim of "reversible error" and instead rests his appeal on the assertion that the 2008 order is void as against public policy and therefore his challenge to the order is timely because void orders may be attacked at any time. In addition, he asserts

---

[3] All further section references are to the Family Code.

[4] Only the department filed a respondent's brief; Wagnon elected not to.

for the first time in his reply brief that the *2011* support order is also void as against public policy for the same reason.

"A judgment or order that is invalid on the face of the record is subject to collateral attack. [Citation.] It follows that it may be set aside on motion, with no limit on the time within which the motion must be made." (8 Witkin, Cal. Proc. (5th ed. 2008) Attack on Judgment in Trial Court, § 207, p. 812.) Although From points to no authority allowing a claim that an order is void as against public policy to be made for the first time on appeal from a trial court order that was addressed to an entirely different argument, we do recognize that "[a]n appellant may be permitted to change his or her theory when a question of law alone is presented on the facts appearing in the record." (9 Witkin, *supra*, Appeal, § 415, p. 473.) Applying that rule here, we will address From's claim that the 2008 support order is void, even though he did not raise that claim in the trial court. As we will explain, however, we find no merit in that claim.

As for the 2011 support order, on the other hand, because From did not challenge that order either in his motion in the trial court *or* in his opening brief on appeal, we decline to consider his challenge to that order made for the first time in his reply brief.

From's argument that the 2008 support order is void as against public policy rests primarily on sections 4053 and 4056. Section 4053 sets forth certain "principles" the court must adhere to in "implementing the statewide uniform [child support] guideline." Two of those principles are pertinent to From's argument: namely, that "[t]he guideline takes into account each parent's actual income and level of responsibility for the children" and that "[e]ach parent should pay for the support of the children according to his or her ability." (§ 4053, subds. (c) & (d).) Section 4056, meanwhile, describes what a trial court is required to do "whenever the court is ordering an amount for support that differs from the statewide uniform guideline formula amount." (§ 4056, subd. (a).) Specifically, "the court shall state, in writing or on the record, the following information: [¶ (1) The amount of support that would have been ordered under the guideline formula.

[¶] (2) The reasons the amount of support ordered differs from the guideline formula amount. [¶] (3) The reasons the amount of support ordered is consistent with the best interests of the children."

According to From, the public policy embodied in the foregoing provisions was violated by the 2008 support order because the order "completely ignored [his] actual income and his ability to pay for the support of his children." In other words, he claims the principle that "a child support order must be based upon a parent's income and ability to provide support" -- which is to be effectuated in the context of a nonguideline support order by the court making a record of what the amount of support would have been under the guideline -- is not simply a matter of private right, but a matter of *public policy*, such that an order contravening that principle is void, regardless of whether the parties agreed to the order and regardless of how much later the challenge to the order is raised. We disagree.

First and foremost, From has failed to identify any adequate source of the public policy he claims was violated by the 2008 support order. To the extent he rests his claim on the assertion that the trial court "completely ignored" the principles in section 4053 and the methodology in section 4056, we think From has identified -- at best -- nothing more than potential *judicial error*. Not every judicial error, however, constitutes a violation of *public policy*, such that the ruling that rests upon that error is perpetually subject to being set aside as void from the outset. This is particularly true with a child support order. If From's argument had merit, then a support obligor could agree to a support order, agree (as From did here) that the court did *not* have to determine or make a record of what guideline support would have been, and then -- after failing to comply with the order for a substantial period of time -- simply argue that the order was void from the very start because the trial court violated public policy, leaving the support obligee with *no support whatsoever* for the period during which the void order was in

place and the obligor failed to comply with it. If anything, it would be *this* sort of result that would violate public policy.

Furthermore, it is not apparent from the record before us whether the 2008 support order at issue here can be reasonably characterized as *not* based on From's actual income and ability to provide support *at the time the order was made*. From's claim that the order violates public policy rests entirely on what happened to his income *after* he entered into the stipulation in December 2007 on which the February 2008 order was based, and the arrears that subsequently piled up under that order when he was unable (for various reasons) to get that order modified. He attempts to raise an issue about the stipulation and order at the time they were made by arguing that "the stock component [of the stipulated support order] is based entirely upon the *speculative nature* of [his] broker/dealer income, not upon [his] *actual income*" at that time, but we simply have no basis for determining whether this is true, because (1) the parties reached their stipulation at the outset of trial, before they put on any evidence of From's actual income at that time; and (2) the underlying moving and responsive papers were not made part of the record on appeal. In short, we have no basis for even guessing what From's income was in December 2007 or what it had been over a reasonable period of time preceding that date. For all we know, the support order to which From agreed would have qualified as a *below*-guideline support order, had the parties not mutually waived the trial court's determination of what support would have been ordered pursuant to the guideline.

Also, to the extent From may be suggesting that a support order based on compensation that derives from the performance of the stock market is void because how the market will perform in the future is inherently speculative, there is simply no basis for that position in the law. Of course the performance of the stock market cannot be predicted; neither can the continued employment of a salaried or hourly employee. *Every* employment situation is subject to some uncertainty as to whether the amount of income earned in the past will be an accurate indicator of the amount of income that will be

earned in the future. Nonetheless, because the future it unknowable, *every* support order must be based on past experience. Recognizing the law with regard to potentially fluctuating income provides that: (1) "a court must arrive at a stable number in order to make a support order, even if income does fluctuate from month to month"; (2) "the idea behind this stable number is to have a reasonable *predictor* of what each spouse or parent will earn in the immediate *future*"; and (3) "the time period on which income is calculated must be long enough to be *representative*, as distinct from *extraordinary*." (*In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075, 1081, 1082.)

Here, on the record before us (which does not demonstrate to the contrary), we must assume that the parties, as between themselves, agreed that From's income from a representative period of time preceding the December 2007 stipulation was sufficient to justify a child support order under which From agreed to pay $60,000 a year in cash and another $138,000 a year from the sale of stock (supplemented, as necessary, with additional cash), to cover his share of all of the children's needs, including child care, medical care, and special needs care. If From did not believe his income at that time was sufficient to pay that amount of support, then he should not have stipulated to do so. But having done so, he cannot now -- years later -- argue that his stipulation, and the court's order entered thereon, violated a public policy that support orders must be based on actual income and the supporting party's ability to pay.

This case is not like *In re Marriage of Jackson* (2006) 136 Cal.App.4th 980 or *In re Marriage of Goodarzirad* (1986) 185 Cal.App.3d 1020, both of which involved court orders that were made in excess of the court's jurisdiction and violated the public policy favoring that a child has two parents rather than one. And it is not like *In re Marriage of Fell* (1997) 55 Cal.App.4th 1058, which involved the set-aside of a judgment based on a waiver of final declarations of disclosure at a time when such a waiver was not permitted by law and where the Legislature had expressly declared that the disclosure statutes were justified by the "public interest in ensuring proper division of marital property, in

ensuring sufficient support awards, and in deterring misconduct." (*Id.* at pp. 1063, 1060-1065.) In contrast to those cases, here From has not identified a clear source of public policy that was violated by the stipulated 2008 support order at the time it was made such that he should be allowed to have that order set aside the better part of a decade later.

DISPOSITION

The March 2015 order denying From's motion to correct the 2008 support order is affirmed. The department shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

/s/
Robie, Acting P. J.

We concur:

/s/
Duarte, J.

/s/
Hoch, J.